UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
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January 17, 2019

Members of the Board:

This supplemental comment is submitted by the General Counsel of the National Labor Relations Board ("Board"), in light of the recent decision of the United States Circuit Court of Appeals for the District of Columbia Circuit in *Browning-Ferris Industries of California, Inc. v. NLRB*, No. 16-1028, --- F.3d ---, 2018 WL 6816542 (D.C. Cir. December 28, 2018) ("DC Circuit Decision"). This supplemental comment is necessary, in particular, because the DC Circuit Decision specifically commented on the Board's current rulemaking process and stated that "[t]he Board's rulemaking . . . must color within the common-law lines identified by the judiciary." DC Circuit Decision, slip op. at 21. While the General Counsel believes that, in making this statement, the DC Circuit majority intended to assist the Board in its rulemaking process and guide the Board in what the majority believes that joint employer standard should be, such dictum is not only not controlling but also impossible to apply, given the different interpretations of common law. In addition, as discussed in more detail below, with respect to rulemaking, the judiciary should not dictate to an executive agency what standards it "must" use in rulemaking, nor can it limit an agency to use common law in defining joint employment in a rule. In fact, even if one of the circuit courts could force the Board to use common law precepts, which it cannot, use of common law precepts in this context would defeat the purpose of rulemaking simply because there is no uniform view, treatment, or definition of joint employment in common law. *Compare, e.g., Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, slip op. at 12-17, 26-32 (Aug. 27, 2015) ("*BFI*"); *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, slip op. at 8-14, 42-47 (Dec. 14, 2017), *vacated*, 366 NLRB No. 26 (Feb. 26, 2018); *with* DC Circuit Decision, slip op. at 22-50 (majority opinion), and slip op. at 10-26 (dissenting opinion). Thus, to the extent that the DC Circuit Decision could be construed to limit the Board's discretion in its rulemaking and to require it to define joint employment based on the majority's version of common law, the NLRB General Counsel respectfully disagrees.

Nevertheless, as further discussed below, the DC Circuit majority's and dissent's analyses of the joint employer standard articulated by the Board in *BFI*

further demonstrate the problems with that standard, and the need to engage in rulemaking to establish a coherent joint employer definition. Indeed, by providing guidance on how to define the rule, rather than directing the Board to adopt a specific rule or no rule at all, the DC Circuit acknowledged the propriety of rulemaking. In addition, as discussed below in Section IV, it is significant that the issues remanded to the Board for further articulation and clarification are the same ones that the General Counsel previously noted in our December 10, 2018 comment needed further articulation and clarification in the Board's final joint employer rule.

In sum, the DC Circuit Decision did not in any way suggest that the Board's rulemaking on this important issue of joint employment was unnecessary or impermissible or that its decision had conclusively disposed of the issue. On the contrary, the DC Circuit Decision even more strongly demonstrates the need for replacing the *BFI* standard with a joint employer rule.

I. The DC Circuit's Decision

In its decision, the DC Circuit majority stated, "to the extent that the Board's joint-employer standard is predicated on interpreting the common law," it would review the Board's standard *de novo*, because the analysis of common law is a pure question of law that is within the court's expertise, rather than the Board's. DC Circuit Decision, slip op. at 17. The DC Circuit majority further concluded that the common law permitted potential control and/or indirect control of essential employment terms to be considered relevant as an evidentiary matter. *Id.*, slip op. at 32 ("the Board's conclusion that an employer's authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency"); *id.,* slip op. at 38 ("indirect control can be a relevant factor in the joint-employer inquiry"). Significantly, the DC Circuit majority expressly stated that it was *not* addressing whether joint employer status could be found *solely* on a finding of indirect control and/or unexercised potential control. *Id.*, slip op. at 32 ("this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship"); *id.,* slip op. at 41 ("*Hy-Brand*'s concern about whether indirect control can be 'dispositive' is not at issue in this case because the Board's decision turned on its finding that Browning-Ferris exercised control 'both directly and indirectly.'").

Next, the DC Circuit majority concluded that, in *BFI*, the Board's joint employer standard failed to differentiate between those aspects of indirect employer control that are relevant to joint employer status, and those that are not relevant to the joint employer inquiry because they are the types of control that are typical of company-to-company contracting and not control of employment terms. *Id.*, slip op. at 38, 45. Finally, the DC Circuit majority addressed the second prong of the *BFI* standard, *i.e.*, whether the putative joint employer possesses sufficient control over

employees' essential terms and conditions of employment to permit meaningful collective bargaining. The DC Circuit majority stated that the Board had not "meaningfully appl[ied]" this prong and had not clarified what terms are essential to make collective bargaining "meaningful" or what "meaningful collective bargaining" entails in this context. *Id.*, slip op. at 48-49.[1]

Thus, as the DC Circuit majority emphasized, it is clear the Board in *BFI* did not articulate what are the essential terms relevant to the joint employer inquiry, and what terms relied upon in the Board's *BFI* decision are merely typical company-to-company contract and contract administration terms that should not create a joint employer relationship. This holding further supports our December 10 comment regarding the critical need to clarify in the final rule what terms are "essential" in the joint employer analysis.

Similarly, it is also clear that the second prong of the Board's *BFI* standard has not been "meaningfully appl[ied]" or clarified, as the DC Circuit majority held. This finding that the essential terms to make collective bargaining "meaningful" had not been articulated in the *BFI* decision also supports our December 10 comment, which recommended that, in the final joint employer standard, the Board should address the individual concerns of different industries and employment settings, should tailor the definition in a more nuanced fashion to those specific industry concerns and business realities, and should state what the effect of a joint employment finding is in specific contexts. Thus, in the context of a representation petition and collective bargaining, a joint employer finding alone, in the absence of a clarification of the factors that must exist to make collective bargaining meaningful, should not result in a bargaining obligation. This is consistent with our December 10 comment that a joint employer finding alone should rarely, if ever, be used to create a bargaining obligation with the labor representative of a co-employer's employees, because "meaningful collective bargaining" is unlikely if a joint employer must be at the bargaining table.

II. The Board Is Not Required To Apply Common Law In Its Rulemaking

In dictum, the DC Circuit Decision seemed to require the Board to establish a joint employer rule that conforms to the DC Circuit's interpretation of common law definitions, by stating that "[t]he Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary." DC Circuit Decision, slip

[1] The DC Circuit majority in *BFI* also concluded that the common law independent contractor/employee analysis is inapplicable in determining joint employer status. The General Counsel agrees with this conclusion and recommends that such analysis should not be imported into the Board's final joint employer rule.

op. at 21. While the Board can and should consider common law principles in its rulemaking to the extent it finds appropriate,[2] the DC Circuit majority's opinion in *BFI* failed to give sufficient weight to the basic proposition that rulemaking is an *executive* function, not a *judicial* one. In this regard, the Board's rulemaking "represents a reasonable accommodation of manifestly competing interests and is entitled to deference." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). Thus, the judiciary cannot dictate what a rule should say unless the rule contradicts the unambiguous terms of the governing statute, *i.e.*, the National Labor Relations Act (the "NLRA" or the "Act"), or clear Supreme Court precedent interpreting the Act. *See, e.g., National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

Here, there is nothing in the Act or in Supreme Court precedent interpreting the Act that requires the Board to follow the common law in creating an employer or joint employer definition, much less a circuit court's particular view of the common law; nor does the Board's proposed rule otherwise conflict with the Act or Supreme Court precedent in any way. Indeed, the DC Circuit majority bases its conclusion that a common law definition should be applied as interpreted by the courts, without deference to the Board, on the absence of a joint employer definition in the Act — an absence that better supports deference to the Board in rulemaking.

The DC Circuit is certainly entitled to its view of what should be the applicable common law principles, and it can properly invoke such a view when it acts in an appropriate setting. But, a court overreaches if it seeks to impose its judicial view on an agency acting within its proper policy-making role. Such overreach inappropriately interferes with "the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."

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[2] As did both the majority and dissenting opinions in *BFI*, 362 NLRB No. 186, slip op. at 12-17, 26-32, and *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, slip op. at 8-14, 42-47.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Indeed, even as to matters not requiring particularized expertise, a court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id*. Therefore, the General Counsel does not believe that the Board needs to create a joint employer rule using the DC Circuit's common law definitions or "color within common law" parameters, as set forth by that court.

Significantly, no court other than the majority in the DC Circuit Decision has ever held that the Board is required to use a common law analysis in analyzing joint employment status, and prior to the *BFI* decision, the Board did not invoke common law for its joint employer analysis. None of the landmark joint employer Board and court cases prior to *BFI* even mentioned common law analysis, including *Laerco*, 269 NLRB 324, 325 (1984); *TLI*, 271 NLRB 798, 798 (1984), *enforced sub nom.*, *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985), and *NLRB v. Browning-Ferris Indus. of Pa.,* 691 F.2d 1117, 1123 (3d Cir. 1982); s*ee also, e.g., Red Top Cab & Baggage Co, etc.*, 145 NLRB 1433, 1434 (1964) ("even assuming that Respondent corporations were not employers of [an employee] in the common law sense, their relationship . . . was so close and they had such control over the employment relationship between drivers and owners as to make them liable as employers under the Act"), *enf. denied on other grounds*, 383 F.2d 547 (5th Cir. 1967). The majority in *BFI* apparently felt it was compelled to rely on common law analysis, but there is no authority supporting this statement. Thus, we believe that the Board is not required to apply common law precepts either in its decisional analysis or in its rulemaking function with respect to joint employment standards.

III. There Are No Uniform Common Law Principles In The Joint Employer Context

Not only is the Board not required to apply common law in its joint employer rulemaking, it would be unwise for the Board rigidly to hew to common law here, where, as has been made clear in the numerous differing opinions at all levels of *BFI* and *Hy-Brand* and other courts' decisions, there is significant dispute concerning the content of the common law itself, and concerning which common law precepts should apply to the joint employer analysis. It would not serve the interest of rulemaking to import and apply conflicting and amorphous common law concepts to a joint employer rule that is intended to provide clarity and consistency nationally.

Because the concept of joint employment does not exist in common law, the courts have often borrowed common law principles of agency from the master/servant versus independent contractor context in analyzing whether an entity is a joint employer of an employee. However, not all courts agree that application of these particular common law principles is proper for the joint

employer analysis.[3] There is thus disagreement on which common law precepts to apply to this analysis.

Further, even if the common law master/servant and independent contractor definitions of common law were applied here, which we believe they should not be, there is no commonly-accepted common law definition of "employee." Rather, multiple state law definitions and definitions in other statutory contexts create a patchwork of conflicting, and changing, common law definitions. Given that there is no uniformity in common law, importing ambiguous and diverse common law concepts into a rule of a federal agency disserves rulemaking goals, creating confusion rather than clarity. The aim of rulemaking is to create a single national standard for joint employment analysis — application of common law does not effectuate that aim or the NLRA's statutory purposes.[4]

As discussed above, the joint employer concept is foreign to common law. There could thus not have been any congressional intent to require the Board to apply common law to a joint employer analysis. Further, there is no statutory, judicial, or practical reason to do so. Indeed, according to the Supreme Court, the Act initially was not limited to apply common law precepts to the definition of "employee." As the *Hearst* case aptly put it:

> It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. . . . That result hardly would be consistent with the statute's broad terms and purposes.

NLRB v. Hearst Publications, Inc., 322 U.S. at 125-126. Thus, extending amorphous principles of common law employee/independent contractor analysis to the joint employment analysis is even more tenuous and makes even less sense.

Further, in other statutory contexts where a regulatory agency has published a joint employment definition, such joint employment definitions have not followed

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[3] See DC Circuit Decision, slip op. at 22-50 (majority opinion), and slip op. at 10-26 (dissenting opinion).

[4] *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 125 (1944) (Congress did not intend interpretation of the NLRA to be bound by common law, which would put "controlling limitations upon the scope of the statute's effectiveness").

the master/servant and independent contractor common law definitions.[5] Similarly, there is no reason for the Board to be bound by common law principles here.

Finally, common law principles need not be applied to the joint employer definition under the NLRA because the statute itself was enacted to recognize entities and relationships not recognized by common law, such as collective-bargaining representatives and collective-bargaining relationships. Because these entities and relationships did not, and do not, exist in common law, application of common law precepts to collective-bargaining relationships could not have been required and makes little sense now.

IV. The DC Circuit Decision Correctly Highlighted Problems with the Board's *BFI* Standard

The DC Circuit majority's opinion also highlights many of the problems with the Board's *BFI* standard. For example, the court correctly emphasized that the Board's decision in *BFI* had improperly relied on evidence of normal company-to-company contract provisions and contract administration decisions as its evidence of "indirect" control of employment terms. The DC Circuit Decision correctly found, as we noted in our December 10 comment, that such types of control are not control of essential employment terms, but rather are normal types of controls agreed to between contractors for policing and administering their contract. The DC Circuit Decision therefore remanded to the Board the question of the types of indirect control of employment terms that could be factors in the joint employer analysis.

Therefore, if the Board chooses to take into account "indirect" control as a factor in the joint employer analysis, it should articulate the contours of "indirect" control, including that there must also be evidence of direct control for a joint employer finding. Since rulemaking is engaged in to provide guidance and clarity, the quantum and scope of control must be clearly articulated in the final rule to achieve these aims. That is not to say that the Board should not consider indirect control in rulemaking. Indeed, examples of indirect control may be helpful in establishing the weight given to other factors. In its final rule, the Board should therefore clearly define the essential terms of employment that should be considered in the joint employer analysis, the degree of control, and whether such control must be direct or can be indirect.

The court also correctly found that the Board failed to delineate what terms and conditions are "essential" to make collective bargaining "meaningful," what is

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[5] *See, e.g.*, 29 C.F.R. § 791.1, *et seq.*, and 29 C.F.R. § 825.106, setting out the joint employment regulations issued by the U.S. Department of Labor pursuant to the Fair Labor Standards Act and the Family and Medical Leave Act, respectively.

"meaningful collective bargaining," . . . "and how it works in this setting." Perhaps the Board's failure to define "meaningful collective bargaining" with respect to a joint employer is related to the difficulty of conceiving of a situation in which requiring a joint employer to be at the bargaining table would create meaningful or more meaningful collective bargaining. Indeed, as we pointed out in our December 10 comment, a joint employer at the bargaining table creates unnecessary additional problems and makes "meaningful" bargaining and an agreement less likely. Further, the DC Circuit's ruling and observations on the necessity of an analysis of meaningful collective bargaining to a joint employer finding parallels our December 10 comment on the necessity in the proposed rule of an explanation or delineation of the circumstances in which a joint employer analysis is required. As the DC Circuit Decision seemed to indicate, it makes little sense to go through a joint employer analysis and, indeed, such a finding could not be made, if part of the analysis does not include whether collective bargaining with the putative joint employer would be meaningful. This holding parallels our December 10 comment that a joint employer analysis and finding is only necessary if it would serve a remedial purpose of the Act and, if no such remedial purpose is served, there should be no joint employer finding.

V. Conclusion

As shown above, the DC Circuit Decision highlights many of the problems of the *BFI* holding and the need for Board rulemaking on the joint employer standard. Indeed, the decision does not in the least question the necessity, viability, or advisability of joint employer rulemaking. As we discussed in our December 10 comment, the Board should clarify in its final rule the following issues discussed by the DC Circuit:

The Board should clarify which essential terms of employment must be controlled by an entity to create a joint employer relationship. Such a list will better guide all parties to an understanding of their obligations under the Act. The Board should clarify whether the factors enumerated are or are not an exhaustive list of all potentially relevant employment conditions that may determine joint employer status. Further, the Board should also provide guidance on how the factors should be analyzed and the weight to be given to particular factors, individually or in combination.

The Board should clarify what is sufficient control of such terms. The Board should provide greater guidance as to what constitutes "substantial actual control" of employees' terms and conditions of employment that is direct and immediate and not "limited and routine."

The Board should clarify the types of decisions that are essential terms of employment decisions concerning another employer's employees, as opposed to

company-to-company contract administration decisions. For example, the Board should clarify that cost-plus contract terms and the communication by a client of a description of tasks to be performed under the contract, to use the examples set forth in the DC Circuit Decision, slip op. at 45-46, does not constitute control of wages in the first instance and supervision in the second instance.

And, finally, the Board should clarify that a joint employer analysis is unnecessary and should not be reached unless the putative joint employer was involved in the alleged unfair labor practice or an alleged unfair labor practice cannot be adequately remedied without the participation of the joint employer or to comply with a remedial order.

Respectfully submitted,

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